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this appeal it has been contended, on behalf of the respondent, that the words "where there has been an appeal," mean, where there has been an appeal presented and admitted, and in support of that he refers us to a case of *Dianatullah Beg* v. *Wajid Ali Shah* (1). There are no such words in ss. 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in s. 541 of the Code of Civil Procedure, that would admit of such a construction.

We are, therefore, of opinion that the words, "where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, *viz.*, when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

C. D. P.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

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February 14

BENODE COOMAREE DOSSEE (DEFENDANT) *v.* SOUDAMINEY DOSSEE (PLAINTIFF).*

Injunction—Mandatory injunction—Damages—Light and air—Ancient lights.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted.

Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief.

Jamnadas Shankarlal v. *Atmaram Harjivan* (2) referred to.

The law regarding relief by mandatory injunction explained.

* Appeal No. 25 of 1888 against the decree of Mr. Justice Trevelyan, dated the 26th July 1888.

(1) I. L. R., 6 All., 438.

(2) I. L. R., 2 Bom., 138.

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THIS was a suit brought by one Soudaminey Dossee, the widow and executrix of one Gopal Lall Mitter (who had died in the month of May 1886), against one Benode Coomaree Dossee for a declaration that she was entitled to the free and uninterrupted enjoyment of light and air through certain windows on the south side of her house, No. 1, Mitter's Lane, and for an order directing the defendant to remove so much of a new house belonging to the defendant as interfered with or obstructed the said right to light and air, or, in the alternative, for Rs. 10,000 as damages.

The plaintiff claimed title through one Ramsoonder Mitter who had died intestate in 1818, possessed of, amongst other properties, a family dwelling-house and premises formerly known as 21, Mooktaram Baboo's Street, but subsequently subdivided into, amongst other premises, the premises known as Nos. 1 and 2, Mitter's Lane. Ram Coondu left six sons, two of whom died intestate leaving widows only, who subsequently died, the property then being held jointly by the four surviving brothers, amongst whom was Gopal Lall Mitter.

Gopal Lall Mitter, in September 1863, brought a suit for partition of the joint family property left by Ramsoonder Mitter, and, on the 8th July 1865, obtained a decree therein directing a partition; the Commissioners of Partition on the 1st February 1868 completed their return, and thereby (amongst other properties) allotted to the said Gopal Lall Mitter, in respect of his share, that portion of the said family dwelling-house, No. 21, Mooktaram Baboo's Lane, which was, prior to the time of suit, separately assessed and numbered 1, Mitter's Lane. The Commissioners also allotted to one Russick Lall Mitter, a nephew of Gopal Lall's, that portion of No. 21, Mooktaram Baboo's Lane, to the south of the wall of No. 1, Mitter's Lane, which was, prior to the time of suit, separately assessed and numbered 2, in Mitter's Lane, and which consisted of a piece of land unoccupied by any buildings, save huts.

On the 2nd March 1869, the members of the joint family executed mutual conveyances of the different allotments made to them. The conveyance to Gopal Lall Mitter granting the allotment made in his favour "with the benefit and advantage of

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ancient and other lights, easements, appendages and appurtenances, etc."

On the 1st July 1884, Russick Lall sold to the defendant Benode Coomaree Dossee the property known as No. 2, Mitter's Lane, and, in November 1884, she commenced to build on this land the foundation of the first storey of a new building, and subsequently continued the same to a second and third storey, the said first and second stories of the defendant's house being higher than the first and second stories of the plaintiff's house.

This new building was built at a distance of 5 feet from the wall of the plaintiff's house, which distance was still further reduced by the projecting cornices of the new building, which left only a clear space of three feet between the two houses; and from the centre of the wall of the new building a balcony, about 14 feet in length, had been built out, the outer side of which was only 20 inches from the upper floor wall of the plaintiff's house. At the time the said building had been commenced Gopal Lall Mitter, who was then in ill-health, had both personally and through his agents warned the defendant's agents that they were building too near to his house, and the defendants promised not to do anything to obstruct the light and air to the plaintiff's house which was one of two stories only.

In the month of May 1886, on which date the plaintiff alleged the second and third stories had not been completed, Gopal Lall Mitter died leaving a widow and an only son, a minor, appointing, by his will, his widow, the plaintiff, as his executrix. The widow took out probate, and, on the 8th July 1887, through her attorney, wrote to the defendant pointing out that the new building materially affected the access of light and air to No. 1, Mitter's Lane, and calling upon the defendant to remove the obstruction within five days. Receiving no reply to this letter, she, on the 19th August 1887, brought the present suit for the purposes above mentioned, alleging that the windows on the south wall of No. 1, Mitter's Lane, were ancient lights which had been enjoyed as of right and uninterruptedly for more than twenty years, and claiming the benefit of such light and air as was previously had and enjoyed by the owners

of the house prior to the partition, and also under and by virtue of the conveyance of the 2nd March 1869 to Gopal Lall Mitter.

The defendant contended that the plaintiff's husband and the plaintiff herself had acquiesced in the erection of the new building, and that knowing their rights they had not objected till after its completion, which they alleged had taken place before the death of Gopal Lall.

Mr. *Pugh*, Mr. *Stokoe*, and Mr. *Allen* for the plaintiff.

Mr. *Gasper* and Mr. *Garth* for the defendant.

TREVELYAN, J.—The plaintiff is the executrix of the will of her deceased husband Gopal Lall Mitter, who died in the month of May 1886.

She claims relief against the defendant on the ground of the defendant having obstructed her light and air by a new house which the defendant has caused to be built to the south of the house No. 1, Mitter's lane, which belonged to the plaintiff's husband and now belongs to his estate. Gopal Lall Mitter acquired this house by a conveyance, dated 2nd of March 1869, and made in pursuance of a partition between Gopal Lall Mitter and his co-sharers. The south wall of the present land was the south wall of the old family dwelling-house which was partitioned. There is no question and it has been proved that the windows in the south wall of the plaintiff's house existed at the time of the partition and for some time before it. The defendant's house has been built upon land which has heretofore been unoccupied by any buildings except huts, and which formed a portion of the property partitioned. There are really four questions in this case :—

Firstly.—To what easements of light and air (if any) over the defendant's premises is the plaintiff entitled ?

Secondly.—Has there been any material and actionable interference with such easements (if any) ?

Thirdly.—To what relief (if any) is the plaintiff entitled ?

Fourthly.—Has the wall built by the defendant at the east end of the passage separating the plaintiff's premises from the defendant's premises encroached on the land of the defendant ?

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The plaintiff puts her right upon the conveyance, to which I have referred, and upon the partition?

By this conveyance the other co-sharers, including defendant's predecessor in title, conveyed to Gopal Lall Mitter the premises No. 1, Mitter's Lane, "with all and singular the benefit and advantages of ancient and other lights easements appendages and appurtenances whatsoever to the messuages lands hereditaments and premises thereby conveyed or any part thereof respectively belonging or in any wise appertaining or reputed deemed taken or known as part parcel or member thereof or any part thereof respectively then or at any time or times theretofore held used occupied possessed or enjoyed."

I think that these words are wide enough to give a right to the light and air which before the time of the partition came into the south windows of the family house, which are the same as the south windows of the plaintiff's house. There is no doubt that light and air came into these windows. It is true they have wooden shutters, but these are capable of being opened and are not fixed. I have no doubt upon the evidence—and there is really no attempt to deny it—that, before the partition, light and air came into the windows on the south side of the house, which is now the plaintiff's, over the land, which is now the defendant's.

There was then on that land no obstruction to the light and air; there were some tiled huts on the land, but until late in the hearing it was not suggested that these huts interfered with the light and air. As far as the upper storey of the plaintiff's house is concerned, it is clear that there can have been no such interference, and as far as the lower storey is concerned, there was not, until the late stage I have mentioned, any suggestion that these huts blocked out light and air.

Apart from the terms of this conveyance, I think that the plaintiff acquired easements of light and air in accordance with the cases which are to be found in my judgment in the case of the *Delhi and London Bank* v. *Hem Lall Dutt* (1). I must find that the plaintiff is entitled to so much of the use and access of light over the defendant's premises as is reason-

(1) I. L. R., 14 Calc., 839.

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ably necessary for the comfortable habitation of her premises, and that she is entitled to so much of the use and access of air over the defendant's premises as may be necessary to prevent her premises being rendered unfit for habitation or business.

The next question is, whether there has been any material and actionable interference with the plaintiff's rights?

The plaintiff's house is two storied. The defendant has built a three storied house at a distance of about 5 feet from the plaintiff's building. The first and second stories of the defendant's house are higher than the first and second stories of the plaintiff's house respectively. The defendant is building a verandah on a level with the floor of her second storey along a portion of her building. This and some projecting cornices are said still further to obstruct the light and air.

Several witnesses speak as to the effect of this building.

Dr. Macleod's evidence shows that the ground-floor of the old building has been practically rendered uninhabitable, and I have no reason for distrusting Nobinkishen Mitter, when he says that he was obliged to remove to the upper-floor. I think that, even without this evidence, it would be obvious that a building of the height of the defendant's premises, built at such a short distance, would have the effect described. It seems to me clear that the lower storey of the plaintiff's house does not obtain from over the defendant's land so much light and air as is reasonably necessary for its comfortable habitation; and furthermore, I think that the lower storey has been rendered unfit for habitation and business so far as air is concerned. The defendant tries to make out a case that the plaintiff gets enough light and air from her inner courtyard, but I do not think that this has got anything to do with the case. She is entitled to get her light and air from over the defendant's premises.

The plaintiff has objected to the balcony which has been erected upon the south of the defendant's premises on a suggestion that it is to be used as a privy. This is a mere suggestion, and without entering into any question as to what right (if any) the plaintiff would have to prevent the erection of a privy near her premises, I am not satisfied that the defendant contemplates

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using this balcony as a privy. I find as a fact that there has been a material and actionable interference with the light and air to which the plaintiff is entitled. With regard to this question the defendant sought to give evidence as to the distance between other houses in the same neighbourhood.

This evidence was, I think, clearly irrelevant, and these distances could not be of the slightest use in this case without a consideration of the rights (if any) by prescription, grant or otherwise of the owners of those houses, and it would involve my trying a separate suit with regard to each of those houses.

I now come to the third question, which is, I think, the most difficult question in the case.

The defendant contends that the plaintiff's husband and the plaintiff have acquiesced in the erection of the defendant's building; that although knowing their right, they did not object until it was completed; and that this suit has been fomented and fostered by one Omirto Nath Mitter, in order to embarrass the defendant in a litigation which was pending between him and the defendant. As far as the balcony, which has not been completed, is concerned, there can, of course, be no question of acquiescence.

There is no doubt, I think, that this litigation is in a great measure owing to Omirto Nath Mitter. He has been pulling the strings throughout; several witnesses speak to the part which he has taken, and there is no doubt that he has managed this case from behind the scenes, whether to assist his relatives or solely to advance his own ends is not so clear. I think the only effect which I can give to the fact that the suit has been to some extent promoted by Omirto Nath Mitter, is, that I must examine with the greater care the evidence, and especially that portion of it which bears upon the second question. In short I must be satisfied that there is a real and not mere fanciful injury. As to that, as I have said before, I am fully satisfied. A great deal of evidence has been given on the question of acquiescence. The plaintiff gives evidence to show that before the lowest storey was completed, objection was made by Gopal Lall Mitter personally and by persons sent by him. The defendant seeks to show that before Gopal died, her third storey was completed, and denies that any objection was made

until a very late date after the building was concluded. I think that the onus of proof on any question of acquiescence, as either destroying or limiting the plaintiff's rights, lies upon the defendant. She must satisfy me that the plaintiff, or her husband, have delayed unreasonably to assert their rights, or have expressly or tacitly assented to what has been done by the defendants.

After a careful consideration of the evidence I am bound to say that I am not satisfied that there has been any acquiescence by either the plaintiff or her husband. There is a certain amount of conflict of testimony as to when the defendant's north wall was completed and whether she, or rather her agents, received any warning from the defendant. I think the probability is in favour of the plaintiff's case. I do not think a man would, without complaint or objection of any kind, allow his light and air to be diminished to the extent that has taken place in the present case. If the plaintiff's husband was well enough to send the messages, which it is said he did, it is likely that he would have sent such messages. If he were too ill to send them, then there would be no question of acquiescence. I do not think that, under the circumstances, the plaintiff herself has delayed at all in putting forward her rights.

The defendant has sought to show by books kept by her brother-in-law the date when the northern portion of her house was completed, but those books on the face of them prove nothing. It is only by an explanation, which may or may not be correct, given by a person who is more or less interested, that any meaning can be attached to these books. They have not the weight of business books, and in fact, on this question, there is nothing more than oral testimony of a not very satisfactory description.

It seems to me that the plaintiff has in no way forfeited her right to have the offending buildings removed. She does not claim to interfere with the ground-floor. The buildings above must be pulled down to such an extent as is necessary for her to obtain from over the defendant's land the light and air to which I have found her to be entitled.

With regard to the fourth question, I am not satisfied on the evidence that there has been any encroachment, and must find as a fact that there has been none.

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The defendant must pay the plaintiff's costs.

From this decision the defendant appealed.

The *Advocate-General* (Sir *Charles Paul*), Mr. *Evans* and Mr. *Garth* for the appellant.

Mr. *Woodroffe* and Mr. *Pugh* for the respondent.

The *Advocate-General*.—The decree should have been one for damages (if any), and not one granting a mandatory injunction. Damages cannot be granted in India on the same principle as they are granted in England, as the mode of living in this country is so different from the mode of living at home; the measure of damages hinges on whether any damage has been suffered. In this case there was no complaint for two years; a mandatory injunction at all events should not have been granted; such an injunction is in the discretion of the Court to allow or not to allow. *Yates* v. *Jack* (1) does not apply to this case. The principles on which summary injunctions are granted are to be found in Kerr on Injunctions, p. 16, and Mandatory Injuctions at pp. 43, 48, 49. See also the cases of *Isenberg* v. *East Indian House Estate Company* (2); *The Curriers Company* v. *Corbett* (3); *Durell* v. *Pritchard* (4); *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (5); *Viscountess Gort* v. *Clark* (6); *Senior* v. *Pawson* (7); and Joyce on Injunctions, p. 1034. Even where the injury amounts to waste, a mandatory injunction is a matter of discretion—*Doherty* v. *Allman* (8). A mere notice about carrying the building higher is not a sufficient notice—see Kerr on Injunctions, p. 18. Here there was no real injury in the true sense of this word; there is no right to south breeze—*Delhi and London Bank* v. *Hem Lall Dutt* (9); *City of London Brewery Company* v. *Tennant* (10).

(1) L. R., 1 Ch. D., 295.
(2) 3 De G. J. & S., 263; 33 L. J., N. S., 392.
(3) 2 Dr. & Sm., 355.
(4) L. R., 1 Ch. App., 244.
(5) L. R., 19 Eq., 616.
(6) 18 L J., N. S., 343.
(7) L. R., 3 Eq., 330.
(8) L. R., 3 App. Cas., 709.
(9) I. L. R., 14 Calc., 839.
(10) L. R., 9 Ch., 212 (220).

The shutting out of air must involve some danger to health, this is not so in the present case. As to the question of light, the injunction is only against the 2nd and 3rd floors, so the light to the ground-floor is not in question; the evidence as to the loss of light is of no value as there is nothing to show whether the doors were open or shut at the time of Mr. Clarke's visit. Then is this an actionable wrong for which an action can be brought at all? The Court below has treated this point in a wrong manner; it should have been treated similarly to the case of *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (1). If it had not been for Omirto Nath, no suit would have been brought; it is, therefore, a fanciful claim. As to what are actionable wrongs, see Goddard on Easements, 3rd Ed., p. 1138. Loss of privacy gives no cause of action. As to acquiescence, see what Lord Westbury says in *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (1). There should be more than cessation of action for acquiescence.

[PETHERAM, C.J.—I think inaction is evidence of acquiescence.]

The case of *Archbold* v. *Scully* (2) limits this. I, therefore, submit there is no case for a mandatory injunction, and no actionable wrong, but if the plaintiff has any right it is one for damages, and there is no finding as to damage.

Mr. *Evans* on the same side—Preventive relief is in the discretion of the Court (see Chapters IX and X of the Specific Relief Act). Here there was no case for a mandatory injunction—*Durell* v. *Pritchard* (3); *Holland* v. *Worley* (4); *Greenwood* v. *Hornsey* (5).

Mr. *Woodroffe* for the respondent—I contend the north wall of my client's house was finished in August 1886; the time from the death of Gopal, until the time that a representative could be found, should be deducted from the computation for the purpose of seeing if there was delay; at all events after probate there was no delay in bringing this suit. I submit that the suit was brought within a year from the completion of the building. I admit that I consented to the defendant building up to my first floor. It

(1) 11 Moore's I. A., 28.
(2) 9 H. L. C., 360.
(3) L. R., 1 Ch. App., 244.
(4) L. R., 26 Ch. D., 578.
(5) L. R., 33 Ch. D., 471.

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was no part of the defendant's case in the Court below that damages should be given and not a mandatory injunction; they argued in the Court below that there was such complete acquiescence that there was no damage. A deprivation of privacy is an actionable wrong. [PETHERAM, C.J.—Is a right of privacy a right to prevent building so as to overlook your neighbour?] Yes. [WILSON, J.—In a town, that would mean that you may not have windows except looking into the street.] No, for the zenana is only on one side.

As to such a right, see *Gokal Prasad* v. *Radho* (1). [PETHERAM, C.J.—We have no doubt as to your having a cause of action; the only question is whether you have a right to a mandatory injunction? You need not trouble yourself about the question of damages, that cannot be decided here, the best way would be for the parties to agree on the question of damages].

On the question as to when a Court of Equity will give relief by way of injunction or by way of damages, see *Aynsley* v. *Glover* (2). A Court will not give damages unless the injury is one which can be adequately compensated by money, and which is not grave and serious; a man is not to be allowed to make himself a judge in his own case as to whether damages or an injunction should be the remedy. There is a great difference between coming to a Court of Equity to enforce an equitable claim, and to a Court of Common Law for a legal right. In India we are not trammelled with the distinction. At home Lord Cairn's Act practically put the Court of Chancery, which before was the only Court to grant injunctions, into the position of the Courts out here, *i.e.*, giving it power to award damages in some cases instead of granting an injunction. Now what is the nature of the injury caused to this property? Until this is discovered, the Court cannot determine whether the plaintiff ought to have the full measure of relief or something else. Regard being had to s. 562 of the Code the case cannot be sent back on the question of damages. [WILSON, J.—The Court can remand the case under s. 566 for the trial of an issue as to damages?] We have shown what was the nature of our damages.

(1) I. L. R., 10 All., 358. (2) L. R., 18 Eq., 544

The principle on which the Courts act is that an injunction will proceed unless the injury be not of a grave and serious character—*Durell* v. *Pritchard* (1). There must be a substantial interference with a right as is laid down in *Aynsley* v. *Glover* (2). At page 555 Sir G. Jessel shows that the word "substantial" is not used in the sense of "enormous." Quiescence is not acquiescence. The Judge in the Court below found that a protest had been made, there is, therefore, no question of acquiescence. Whether anything in the nature of mere delay, such delay not being acquiescence, constitutes an abandonment of a plaintiff's rights, is discussed in *Jamnadas Shankarlal* v. *Atmaram Harjivan* (3); that case also shows that where the injury is of a continuing nature, damages cannot be given as relief, as it is impossible to assess damages from year to year, and that in such cases an injunction is granted. It must also be shown that if there was delay such delay has acted prejudicially to the other side. See also *Bennison* v. *Cartwright* (4) where there was delay of more than a year in bringing the action. The case of the *Land Mortgage Bank of India* v. *Ahmedbhoy Habibhoy* (5) points out when an injunction and not damages will be granted, and English cases are there cited as authority for the point—*Kino* v. *Rudkin* (6); *Dent* v. *The Auction Mart Company* (7). I gather from the English cases that where property is seriously or materially lessened, in value by a cause permanent in its character, there the Court will grant an injunction and not damages. *Senior* v. *Pawson* (8) was a case in which there were special circumstances, and on that account damages were given.

Baxter v. *Bowen* (9) was another special case and has been explained in *Gaskin* v. *Ball* (10). As to where a mandatory injunction will be granted see *Aynsley* v. *Glover* (2) and *Krehl* v. *Burrell* (11) where a mandatory injunction was granted.

(1) L. R., 1 Ch. App., 250.
(2) L. R., 18 Eq., 544 (552).
(3) I. L. R., 2 Bom., 133.
(4) 33 L. J., Q. B., 137.
(5) I. L. R., 8 Bom., 35 (67).
(6) L. R., 6 Ch. D., 160.
(7) 3 De. G. & J., 275.
(8) L. R., 3 Eq., 330.
(9) 23 W. R. (Eng)., 805.
(10) L. R., 13 Ch. D., 329.
(11) L. R., 7 Ch. D., 551.

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Mr. *Evans*, in reply, referred to the cases of *Gaskin* v. *Ball* (1) as explaining that *Baxter* v. *Bowen* (2) is an exception to the rule and is not the rule, and on acquiescence, to *Sayers* v. *Collyer* (3).

[On the conclusion of the arguments a certain sum, at the suggestion of the Court during the course of the arguments, was agreed upon by Counsel for both parties as satisfying the claim to which the plaintiff was entitled to as damages, no issue on this question having been framed or tried by the Court below; leaving the decision of the Court to deal with the question as to whether a mandatory injunction should or should not be granted under the circumstance of the case.]

The judgment of the Court (PETHERAM, C.J., and WILSON, J.) was delivered by

WILSON, J.—This case, so far as it relates to the granting of a mandatory injunction, is of undoubted importance to suitors in this Court, and it seems to me that the law on the point has been somewhat misapprehended in the Court below. It rather seems to have been assumed that if the cause of action which undoubtedly existed was established, a mandatory injunction, to pull down the defendant's building or so much of it as might be necessary, would follow as a matter of course. The principal authorities on the subject have been cited and their effect I think is plain.

The cases have all fallen under one or other of two classes. The first kind of case is that of a man who has a right to light and air which is obstructed by his neighbour's building, and who brings his suit and applies for an injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere with his light and air; a number of cases under that head have been cited. A leading case is that of *Dent* v. *The Auction Mart Company* (4). To the same class belong *Aynsley* v. *Glover* (5); *Smith* v. *Smith* (6); *Krehl* v. *Burrell* (7); *Greenwood* v. *Hornsey* (8). Those cases all

(1) L. R., 13 Ch. D., 329.
(2) 23 W. R. (Eng.), 805.
(3) L. R., 28 Ch. D., 110.
(4) L. R., 2 Eq., 238.
(5) L. R., 18 Eq., 544.
(6) L. R., 20 Eq., 500.
(7) L. R., 7 Ch. D., 551.
(8) L. R., 33 Ch. D., 471.

establish that although the remedy by mandatory injunction is always in the judicial discretion of the Court, and the circumstances of each case may be taken into consideration, still as the general rule, and in the absence of special circumstances, if the injured man comes to Court on the first opportunity after the buildings have been commenced, or on the first opportunity after he has seen that they will interfere with his rights, an injunction being necessary, a mandatory injunction is granted. On the other hand, however, there may be circumstances which will lead the Court to refuse the injunction, as has certainly been done in two cases—*Senior* v. *Pawson* (1) and *Holland* v. *Worley* (2).

The other class of cases comes under a different principle. When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be.

This is shown by the case of *Isenberg* v. *The East Indian House Estate Company* (3); *Curriers Company* v. *Corbett* (4); *Durell* v. *Pritchard* (5). The latter case came before the Lords Justices from a decision of the Master of the Rolls, and L. J. Turner lays down that it is within the jurisdiction of the Court to grant a mandatory injunction, but it ordinarily abstains from granting one unless under very special circumstances. The next case I would refer to—*City of London Brewery Company* v. *Tennant* (6)—where the jurisdiction of the ourt to grant a mandatory injunction is reaffirmed, but it is added in the judgment of Lord Selborne: "We know, of course, that the Court is not in the habit of doing so except under special circumstances, but those circumstances may exist." The same law is followed in *Stanley of Alderley* v. *Shrewsbury* (7). There have been cases where mandatory injunctions have been granted. In *Baxter* v. *Bowen* (8) a mandatory injunction was granted by Vice-Chancellor Bacon, and his judgment

(1) L. R., 3 Eq., 330.
(2) L. R., 26 Ch. D., 578.
(3) 3 De. G. J. & S., 263.
(4) 2 Dr. & Sm., 355.
(5) L. R., 1 Ch. App., 244.
(6) L. R., 9 Ch. App., 212.
(7) L. R., 9 Eq., 616.
(8) 23 W. R. (Eng.), 334.

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was affirmed on appeal (1). But in that case the circumstances were peculiar. The thing removed was a mere shed, and there was something like an agreement between the parties that no objection should be taken on the ground of complainants having delayed in bringing their action. That case has been explained as a very special case in *Gaskin* v. *Ball* (2), where it is said : "The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter* v. *Bowen* (1) was a very special case, just one of those exceptions which prove the rule." Certain circumstances have been relied on in this case as making it a special one, particularly the notice which the plaintiff's witnesses say they gave to the defendants not to continue the building so as to obstruct the plaintiff's rights. The learned Judge in the Court below has believed these witnesses, and I accept his finding ; but the authorities show that mere notice, not followed by legal proceedings, is not sufficient.

That is how matters stand, so the English authorities, and, I think, the Indian authorities are to the same effect. I had occasion to refer to the authorities in the case of the *Shamnugger Jute Factory* v. *Ram Narain Chatterjee* (3). I only refer to that case because on pages 200-201 a good many of the authorities are collected. A Bombay case was cited, which, it was contended, is inconsistent with this view of the law, *Jamnadas Shankarlal* v. *Atmaram Harjivan* (4). There, under the circumstances of the case, a mandatory injunction was granted ; but we cannot, I think, regard that case as laying down any broad rule that mandatory injunctions are to be granted as a matter of course ; but it appears to me the law on this point is well settled.

T. A. P. *Appeal allowed.*

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(1) 23 W. R. (Eng.), 805.
(2) L. R., 13 Ch. D., 329.
(3) I. L. R., 14 Calc., 189.
(4) I. L. R., 2 Bom., 138.